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STATEMENT OF FACTS AND PROCEDURE

1. The Facts At Trial

The government's statement of facts is incomplete insofar as it suggests that the evidence was overwhelming that respondent was guilty of intentionally shooting her husband without legal justification.[1] In fact, however, as found by the Court of Appeals, the evidence leads to "starkly disparate" conclusions. J.A. 2a. Therefore, respondent summarizes the omitted facts as follows:

At trial Mr. France testified that after a heated domestic argument with the respondent, Darlina France, his wife, he started "beating the hell out of her." Tr. 52, 73. He "grabbed ahold of her throat" and "slammed her up side [sic] the head." Then, he "threw her down on the floor, picked her back up and threw her back again, and slammed her up [sic]." Tr. 53. Finally, he "threw her down" on broken glass on the floor. Tr. 54.

Mr. France admitted to engaging in brutally assaultive behavior before, having put a former wife in the hospital. Tr. 73, 310. Mrs. France was particularly vulnerable to this type of violence, since she previously had been repeatedly and seriously abused by a former husband in a prior marriage. Tr. 73, 309. To stop her former husband's repeated beatings, which continued even after they separated, Tr. 310, she once "shot up over his car" with a gun. Tr. 311.

Mrs. France testified that after the brutal beating by her husband, she believed she would continue to be beaten, because "he kept coming." Tr. 316, 345, 353. To protect herself she retrieved the gun that he had given her earlier and pointed it towards him to frighten him. When he stopped coming towards her, she testified that she tried to uncock the gun, but the hammer slipped, and she accidentally shot him in the shoulder. Tr. 317. Immediately after the shooting she rushed

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[1] Respondent alerted the government to its error in her brief opposing certiorari at page 2, but the government has apparently ignored respondent's point, because the facts set forth in its brief on the merits are virtually identical to those set out in its petition.

over to her husband and stated, "Oh my God, I shot you. I didn't mean to." Tr. 61, 71, 101. She told her daughter to call an ambulance, Tr. 100, 151, 157, and she begged her husband's forgiveness. Tr. 61, 71, 101, 151, 157. She later visited him in the hospital and told him she was "very sorry." Tr. 63.

Mr. France testified that he too believed that the shooting was accidental. Tr. 64, 67, 201, 205. He corroborated that the gun had a very light trigger pull and that, previously, he himself had accidentally fired the gun, almost shooting himself in the leg. Tr. 64, 70. After Mr. France was released from the hospital, he resumed living with Mrs. France and their two children without incident. Tr. 63, 79. During this period Mrs. France was assisting her husband with his therapy. Tr. 77, 87. They had a good relationship, Tr. 79, loved each other and planned on staying together. Tr. 320.

Mr. France did not file charges against Mrs. France and, in fact, requested that she not be prosecuted. Tr. 79, 201; Pet. App. 3a. Notwithstanding the plea of Mr. France not to prosecute his wife, the government charged Mrs. France in Count I with assault with intent to commit murder in violation of 18 U.S.C. § 113(a), and in Count II with assault resulting in serious bodily injury, in violation of 18 U.S.C. § 113(f). Finally, she was charged in Count III with using a firearm during commission of a crime, in violation of 18 U.S.C. § 924(c) which, upon conviction, carries a mandatory consecutive five-year sentence without possibility of probation or parole. After a jury trial Mrs. France was convicted on Count I of the lesser included offense of assault with a dangerous weapon in violation of 18 U.S.C. § 113(c), and was found guilty as charged on Counts II and III.

At sentencing before the Honorable Robert J. Kelleher, Mr. France, through written correspondence, urged that his wife not be sent to prison. Tr. Sentencing 15. Judge Kelleher "expressed hostility" to the statute's requirement that he sentence France to the mandatory five-year sentence without parole. *France*, Pet. App. 4a. He said her case did not warrant such a sentence. *Id.* He said the statute had relegated him to only a "*pro forma*" performance and that he "might as well go fishing on the day of sentence and ask the clerk to pronounce

sentence." *Id.* The court sentenced France to two concurrent terms of probation on the assault charges, but the judge felt bound by the mandatory penalty provision of § 924(c) to impose a five-year sentence without parole on Count III, and he so ordered. In its decision the Ninth Circuit agreed with Judge Kelleher's views as to the inappropriateness of separating France from her husband and her two children for five years. Furthermore, the court thought that the government's prosecution of France under the five-year mandatory penalty provision of § 924(c) was so heartless that it cited to the government Portia's speech on the quality of mercy from Shakespeare's *The Merchant of Venice*. Pet. App. 11a-12a.

2. Procedure Pertaining To Jury Selection And The Appeal.

As the government concedes, at the time of respondent's trial it was the "regular practice" in the District of Hawaii to have magistrates select the jury in "virtually all" felony cases. Pet. Cert. 3, 7. Pursuant to that policy, jury selection in the instant case was presided over by Magistrate Bert Tokairin. J.A. 5-6.

France's trial counsel was Benjamin Cassiday, Jr., who had formerly been an Assistant Federal Public Defender acting under the supervision of respondent's current counsel on appeal, Michael R. Levine, the Federal Public Defender for the District of Hawaii. As an Assistant, Cassiday had direct experience with the Hawaii policy of delegating to magistrates all jury selections because in at least two earlier cases, *United States* v. *Wilhelm*, Cr. No. 84-0994 (D. Haw. Aug. 6, 1984) and *United States* v. *Von Hemert*, CR. No. 84-2201 (D. Haw. Nov. 29, 1984), he had fruitlessly objected to jury selection by Magistrate Tokairin, both orally and in writing. *See* Lodged Documents A and B.[2] Cassiday objected to Magistrate Tokairin's

[2] Respondent has lodged with the Clerk five public court records, Documents A-E, whose validity is not subject to dispute and of which the Court is requested to take judicial notice. *See Boag* v. *MacDougall*, 454 U.S. 364, 367 (1982) (Rehnquist, J., dissenting); *Mas-*

selecting the jury on the same grounds as did the defendant in *United States* v. *Gomez*, 109 S. Ct. 2237 (1989): that no statute authorized the procedure and that, in any event, such a statute would be unconstitutional. *See* Lodged Document B. This objection was overruled by Magistrate Tokairin, and Cassiday appealed to the Chief Judge of the District of Hawaii. In a written decision, the Chief Judge sustained the Magistrate and held that it was proper for him to select the jury notwithstanding any objection. *See* Lodged Document C.

Levine, Cassiday's supervisor, had also unsuccessfully objected to magistrates selecting the jury. He challenged the Hawaii policy in *United States* v. *Bezold*, Cr. No. 82-1027 (D. Haw. Feb. 28, 1984), *see* Lodged Document D, tried before the Chief Judge himself, but the policy was affirmed by the Ninth Circuit in *United States* v. *Bezold*, 760 F.2d 999 (1985), and this Court denied certiorari in the case on January 16, 1986. *See* 474 U.S. 1063 (1986). Moreover, in *United States* v. *Peacock*, 761 F.2d 1313 (9th Cir.), *cert. denied*, 474 U.S. 847 (1985), in an opinion authored by now-Justice Kennedy, the Court of Appeals reaffirmed the validity of the policy in a case arising in another district.

Therefore, when jury selection in the instant case began on April 27, 1987 before Magistrate Tokairin, Cassiday made no

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sachusetts v. *Westcott*, 431 U.S. 322, 323 n.2 (1977).

Document A is a copy of the docket sheets from *Wilhelm*. The entry for June 18, 1984, the date of jury selection in that case, notes as follows: "jury selection—jury called for jury selection—43 jurors present. Objection by Cassida[y] in regards to magistrate conducting jury selection. Objection noted and DENIED. [12 Jurors Selected By Tokairin]."

Document B is a copy of the written objection that Cassiday filed to having Magistrate Tokairin preside over jury selection in *Von Hemert*. Document C is the Chief Judge's written opinion overruling Cassiday's objection. Document D is Levine's written objection in *United States* v. *Bezold*, 760 F.2d 999 (9th Cir. 1985), *cert. denied*, 474 U.S. 1063 (1986). Finally, Document E is a copy of 2 pages only from docket sheets in *United States* v. *Rewald*, Cr. No. 84-2417 (D. Haw. Dec. 9, 1985), referred to at Pet. Br. 26 and in this brief at 23 n.9.

objection because objection reasonably appeared to him to be futile under the firmly entrenched practice of the district as well as under the existing law at both the district and appellate court levels. *France*, Pet. App. 11a (objection by counsel "clearly" futile). Significantly, however, neither Cassiday nor respondent herself gave express consent to the procedure.

During jury selection, Magistrate Tokairin did ask the prospective jurors a question that Cassiday posed regarding attitudes toward guns. However, he refused Cassiday's request to ask a question regarding the prospective jurors' attitude toward Vietnam War veterans. J.A. 48-49. This was an important question because Mr. France was a Vietnam veteran and Cassiday believed that some people had "strong" feelings about such veterans. *Id.*

On appeal from respondent's conviction, she challenged only the constitutionality of the mandatory sentencing provision of the § 924(c) conviction, and did not raise the magistrate issue, continuing to believe it to be futile to do so. After oral argument in the Court of Appeals, while the decision below was pending, this Court decided *Gomez*. In *Gomez* the Court unanimously held that a magistrate has no jurisdiction to preside over jury selection because Congress had not statutorily conferred this power. Moreover, even though the defendant in *Gomez* could show no prejudice, the Court held that because he had a "basic" right "to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside," harmless-error analysis could "never" be applicable. *Gomez*, 109 S. Ct. at 2248.

Within three weeks of the decision in *Gomez*, while the appeal in *France* was still pending, respondent moved the Court of Appeals to reverse her conviction under *Gomez* because a magistrate had selected the jury. After receiving supplemental briefs from the parties, the Court of Appeals agreed. It held, first, that *Gomez* should be applied retroactively to respondent's case because it was pending on direct appeal. The court then held that respondent had not waived her right to raise the *Gomez* claim by her counsel's failure to object in the district court for two reasons. First, no objection was

necessary because, as a "broad, definitive" jurisdictional rule, *Gomez*, did not require an objection. Pet. App. 9a, 6a, n.1. Second, in view of *Bezold* and *Peacock*, the Ninth Circuit's "solid wall" of precedent that had authorized magistrate voir dire even over a defendant's objection, any objection by Cassiday would have been futile. Pet. App. 9a-11a. The court reasoned that requiring a futile objection would be senseless because it would encourage defense counsel "to burden district courts with repeated assaults on then settled principles out of hope that those principles will be later overturned . . . ." Pet. App. 10a (quoting *Guam* v. *Yang*, 850 F.2d 507, 512 n. 8 (9th Cir. 1988) (en banc)).

Finally, citing the Court's language in *Gomez*, the Court of Appeals reasoned that the rule announced in *Gomez* "touches on one of the most basic rights of the accused," Pet. App. 10a, the right to have "all critical stages of a criminal trial conducted by a person with jurisdiction to preside." Pet. App. 6a (quoting *Gomez*, 109 S. Ct. at 2248). In view of the importance of this right and in view of the Ninth Circuit precedents which until *Gomez* had authorized the procedure violating that right, the Court of Appeals held that it would be "at best unseemly, and at worst irresponsible" to penalize respondent "for following the law as it existed at the time her jury was selected." Pet. App. 10a.

SUMMARY OF THE ARGUMENT

There are four independent grounds for affirming the judgment below.

I. The Court of Appeals correctly held that the contemporaneous objection requirement of Rule 51 does not bar relief here, because any objection at trial would have been futile in light of the firmly entrenched district court practice that respondent's counsel had previously challenged on appeal to no avail, which resulted in adverse controlling Ninth Circuit authority.

A. Many decisions of this Court have recognized that the contemporaneous objection requirement does not bar relief, especially on direct appeal, where objection at the time of trial

would have been futile. In addition to the specific circumstances where futility had been recognized by the Court, courts of appeal have held that the futility is sufficiently established where adverse controlling circuit court precedent—a wall of circuit court authority—made any such objection hopeless. Hence the legal rule relied on by the Ninth Circuit is sound.

B. Under that legal rule, respondent's failure to object to the magistrate's jurisdiction over jury selection at the time of her trial does not preclude relief under *Gomez*. The Ninth Circuit had twice squarely rejected the precise claims later accepted by this Court in *Gomez;* this Court had denied certiorari on both occasions; and no other circuit had disagreed. The United States' argument that nothing in those Ninth Circuit decisions prevented the district court from deciding to conduct voir dire itself, had respondent so requested, fails to undermine the Ninth Circuit's finding of futility. The record shows that the Hawaii district court had adopted a firm practice of assigning voir dire to magistrates under which the latter had presided over "virtually all jury selection proceedings." Pet. App. 13a. The Hawaii Federal Public Defender, respondent's current counsel, and his former assistant, respondent's trial counsel, had challenged that practice, but their objections had been rejected by the magistrate, the district court, and the Ninth Circuit, with this Court denying certiorari. Thus by the time of respondent's trial, the Hawaii practice was firmly entrenched and had withstood challenge to the exhaustion of appellate remedies, and the Federal Defender and his assistant had worn out their welcome on this subject with the magistrate and the district court.

C. The Court of Appeals' finding that objection would have been futile in light of local practice and Ninth Circuit authority is entitled to deference from this Court, because the effect of its precedent on the districts within the circuit is a matter peculiarly within the province of the Court of Appeals. This is particularly true in the instant case where that finding is supported by ample evidence of futility.

D. The habeas corpus doctrine of futility relied on by the government is inapposite, as state-federal comity considera-

tions animating the strict "cause and prejudice" test are not present here. In any event, even this strict test is satisfied.

E. Finally, policy considerations strongly support the judgment below. Judicial economy strongly militates against requiring objections that are foreclosed by a solid wall of circuit authority. Otherwise conscientious defense advocates would be compelled to burden the trial and appellate court with repeated assaults on settled principles in order to guard against the possibility, however remote, that those principles might later be overturned. The interests of justice are also advanced by affirming the judgment below, for it would be unfair to respondent to penalize her for her counsel's good faith reliance on the existing law and for his failure to possess extraordinary vision. On the other hand, an objection at trial would have served none of the goals of the contemporaneous objection rule, and the government concedes that those purposes are not furthered where futility in fact exists.

II. Because a magistrate selected the jury in this felony case, the conviction is void for two reasons. First, the Court unanimously held in *Gomez* that Congress did not confer jurisdiction on magistrates to select juries in a felony case. Therefore, even respondent's express consent could not confer the subject matter jurisdiction on the magistrate that Congress withheld. Thus, because a critical part of the trial was conducted by a person without jurisdiction, the trial was not held before a competent tribunal and respondent's conviction was void.

Moreover, the government acknowledges that there are jurisdictional "limits" to the extent to which a court may delegate criminal trial functions. Pet. Br. 20. Thus the government concedes that even with consent a court could not delegate trial functions to a "panel of citizens" because such a delegation would be a "flagrant departure" from traditional procedures and would seriously affect "the fairness, integrity or public reputation of the public proceedings." Pet. Br. 20-21. Because there is no principled way to distinguish the delegation in the instant case from that posited by petitioner, the decision below should be affirmed.

Second, respondent was deprived of her Article III right to have an Article III judge presiding at jury selection, a critical

stage of her felony trial. This right is a nonwaivable structural right that arises from the core of Article III § 1 as well as from Article III § 2, cl. 3, which guarantees the right of trial by jury. A legitimately constituted jury necessarily includes an Article III judge presiding at jury selection.

III. A final exception to the contemporaneous objection rule which justifies affirmance of the decision below is "plain error." In *Gomez* this Court unanimously held that violation of the defendant's "basic" right to have a "person with jurisdiction to preside" requires reversal without any showing of actual prejudice. Furthermore, the Court equated the error to that in having a biased judge and held that such an error "could never be treated as harmless." *Gomez*, 109 S. Ct. at 2248. Because such a fundamental error seriously affects the integrity or public reputation of the courts, and because its harmful effect on the jury is impossible to measure, it follows that the error is "plain."

IV. The result in *France* should also be affirmed on grounds briefed by the parties in the Court of Appeals, but not addressed by that court. Assuming, *arguendo*, respondent could have waived her right to have an Article III Judge select the jury, failure to object by respondent's counsel was insufficient to establish a valid waiver. Whether or not the basic jurisdictional right identified in *Gomez* is a constitutional right conferred by Article III, the intent of Congress and the weight of court precedent make clear that this basic trial right cannot be waived by the mere failure of counsel to object. Thus, because there is no evidence of a knowing and express consent by respondent herself, the decision below should be affirmed.

ARGUMENT

I. THE CONTEMPORANEOUS OBJECTION RULE DOES NOT BAR RELIEF BECAUSE OBJECTION WOULD HAVE BEEN FUTILE IN LIGHT OF THE ENTRENCHED DISTRICT COURT PRACTICE AND A SOLID WALL OF NINTH CIRCUIT AUTHORITY SUSTAINING THAT PRACTICE.

A. The Contemporaneous Objection Rule Does Not Preclude Relief Where Objection Would Have Been Futile Under Controlling Circuit Authority.

Respondent fully acknowledges the importance of the contemporaneous objection rule. This rule, however, is not sacro-

sanct and "giving effect to [it] for its own sake 'would be to force resort to an arid ritual.'" *Henry* v. *Mississippi*, 379 U.S. 443, 447-48 (1965) (quoting *Staub* v. *City of Baxley*, 355 U.S. 313, 320 (1958)). After all, "[r]ules of practice and procedure are devised to promote the ends of justice not to defeat them." *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941); *see* Fed. R. Crim. P.2 (the federal rules "are intended to provide for the just determination of every criminal proceeding").[3] Thus, as petitioner concedes, the Court has recognized several important exceptions to the contemporaneous objection rule. This case falls within those exceptions.

The first exception and one of the two bases upon which the Court of Appeals rested is "futility." It may be true, as the government asserts, Pet. Br. 24, that this Court has never explicitly enunciated a general "futility" exception to the contemporaneous objection rule. Nevertheless, the Court has *implicitly* recognized the exception and has applied it to excuse failures to object in a variety of contexts both on direct appeal and in habeas corpus cases. *See Osborne* v. *Ohio*, 110 S. Ct. 1691, 1703-05 (1990) (failure to request jury instruction in state trial on elements of lewdness did not waive issue where request "patently futile" in light of trial judge's earlier ruling on motion); *Reed* v. *Ross*, 468 U.S. 1, 17 (1984) (failure to object in state court to instruction on burden of proof was excused where at time of trial there was no reasonable basis for the objection under the prevailing law); *Grosso* v. *United States*, 390 U.S. 62, 70-71 (1968) (failure to raise Fifth Amendment claim below excused because of its futility in light of prevailing law); *Leary* v. *United States*, 395 U.S. 6, 27-29 (1969) (failure to raise objection below to constitutionality of the statute was futile in light of prevailing law). The State, too, has been the beneficiary of the futility doctrine. For example, in *Pennsylvania* v. *Ritchie*, 107 S. Ct. 989 (1987), the Court held that the State was

[3] Rule 2 in its entirety reads as follows, "Purpose and Construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

not required to raise a fruitless Sixth Amendment claim to the state court before seeking federal relief when the state court had already adversely decided the issue.[4] *Id.* at 997 n. 7.

The Court has recognized a futility exception particularly in cases where, as here, there has been a significant change in the law since the trial. For example, in *Grosso*, the Court rejected the government's argument that the defendant had waived a Fifth Amendment defense to his failure to pay excise tax on his gambling proceeds by failing to raise his claim at trial. The Court reasoned that "[g]iven the decisions [of this Court's prior cases] which were on the books at the time of petitioner's trial" his failure to object below was understandable. *Grosso*, 390 U.S. at 71.

Petitioner seeks to explain away *Grosso* on the ground that the defendant's objection was "novel" rather than "futile," Pet. Br. 23, but that explanation is unpersuasive. There was nothing

[4] The Court's application of the futility principle to excuse a failure to object below may be viewed as a specific application of the Court's more general power to excuse such a failure in order "to promote the ends of justice." *Hormel*, 312 U.S. at 557. To promote justice the Court has said that "the matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the Court of Appeals, to be exercised on the facts of individual cases." *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976); *see In re Howell*, 731 F.2d 624, 627 (9th Cir.), *cert. denied*, 469 U.S. 933 (1984) ("Rule of waiver is one of discretion rather than jurisdiction . . . and may also be relaxed . . . when injustice might otherwise result"). This is particularly true on direct appeal from a federal criminal conviction. *See Grosso*, 390 U.S. at 71 (although claim not raised below, Court has discretion under 28 U.S.C. § 2106 to dispose of case "as may be just under the circumstances"); *On Lee* v. *United States*, 343 U.S. 747, 750 n.3 (1952) (Court of Appeals acted within its discretion in considering the issue even absent objection).

Thus, even absent objection below, appellate courts rightly exercise their discretion to reach issues where otherwise, as in the case at bar, "the interests of justice" would not be advanced. *E.g.*, *Henderson* v. *Dep't of Public Safety*, 901 F.2d 1288 (5th Cir. 1990); *United States* v. *La Guardia*, 902 F.2d 1010, 1021 (1st Cir. 1990).

"novel" about the idea that the Fifth Amendment could serve as a defense to the nonpayment of taxes on gambling proceeds. Indeed, courts had been dealing with similar issues for many years before *Grosso*. *See, e.g.*, *United States* v. *Costello*, 352 F.2d 848, 850-51 (2d Cir. 1965) (discussing cases), *rev'd sub nom. Marchetti* v. *United States*, 390 U.S. 39 (1968).

Similarly, in *Reed* the Court held that a defendant's failure to object to a jury instruction in state court on the burden of proof was excused because "the state of the law at the time of Ross's appeal did not offer a reasonable basis upon which to challenge the instruction." *Reed*, 468 U.S. at 16-17. It is true that *Reed* uses the term "novel[ty]" rather than "futility." *Id.* at 22. It seems clear, however, that, as in *Grosso*, there was nothing at all "novel" about Ross's objection because, as pointed out in the dissent, "the framework for respondent's claims" was in place and "had been settled" many years earlier. *Id.* at 25-26 (Rehnquist, J., dissenting). Thus "the legal basis for making his claim was reasonably available to him." *Id.* at 25 n.2. In the case at bar, as in *Reed*, "the state of [Ninth Circuit] law" at the time of respondent's trial "did not offer a reasonable basis upon which to challenge" the magistrate's conduct of jury selection. Therefore, respondent's failure to object at trial was properly excused.

Also illustrative is *Osborne*. In that case the defense counsel made a motion to dismiss a lewdness charge on the ground that the underlying statute was overbroad, but he failed to request the judge to instruct the jury on the elements of lewdness after the motion was denied. On appeal the defendant argued that the failure to instruct the jury was reversible error, but the government, as in the instant case, argued that the attorney had waived the issue by not requesting the instruction. This Court rejected the government's argument and held that in light of the trial judge's earlier ruling denying the defense motion, a request for the instruction would have been "patently futile." *Osborne*, 110 S. Ct. at 1705 (quoting *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965)). Although in *Osborne* trial counsel's failure to request the instruction was before the same judge who had denied his motion in the same case, the futility principle applies equally well to the instant case, where

respondent's counsel had fruitlessly objected before the same magistrate in *different* cases. The request in either situation was equally futile.

Yet another example is *Estelle* v. *Smith*, 451 U.S. 454 (1981), in which this Court rejected the state's argument that the defendant had waived a Fifth Amendment claim by failing to object below. In rejecting the argument, the Court adopted "the reasons stated by the Court of Appeals," *id.* at 469 n.12, one of which was the "apparent futility" of the objection in light of the prevailing law. *Smith* v. *Estelle*, 602 F.2d 694, 708 n.19 (5th Cir. 1979), *aff'd*, 451 U.S. 454 (1981). Thus, in the case at bar as in *Estelle*, respondent's failure to object to Magistrate Tokairin presiding over jury selection should be excused because of its "apparent futility." *Cf. Castille* v. *Peoples*, 109 S. Ct. 1056, 1059 (1989) (where results "have effectively been predetermined" by state law, it makes no sense to require a defendant to return to state court to exhaust remedies).

Additionally, circuit courts have long applied the futility principle to excuse counsel's failure to object or to raise an issue at trial because of futility under the prevailing law.[5] For exam-

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[5] *See Callanan* v. *United States*, 881 F.2d 229, 231 (6th Cir. 1989) (fact that issue "appeared to be settled" constituted cause for not raising it), *cert. denied*, 110 S. Ct. 1816 (1990); *United States* v. *Mulder*, 889 F.2d 239, 240 (9th Cir. 1989) (intervening Supreme Court decision constitutes good cause for failure to raise issue below); *Ingber* v. *Enzor*, 841 F.2d 450, 454-55 (2d Cir. 1988) (defendant not required to pursue futile course); *Guam* v. *Yang*, 850 F.2d at 512 n.8 (failure to object to jury instruction not waiver where objection futile in view of circuit law); *Smith* v. *Estelle*, 602 F.2d at 708 n.19 (Sixth Amendment issue considered on appeal, although not raised at trial because of surprise and apparent futility in raising point); *United States* v. *Indiviglio*, 352 F.2d 276, 280 n.7 (2d Cir. 1965) (en banc) ("Appellate courts often notice error not objected to below when, under the law existing at the time of trial, objection would have been futile"), *cert. denied*, 383 U.S. 907 (1966); *Angelet* v. *Fay*, 333 F.2d 12 (2d Cir. 1964) (failure to object to admission of evidence not waived where futile under existing law), *aff'd*, 381 U.S. 654 (1965); *United States* v. *Liguori*, 438 F.2d 663, 665 (2d Cir. 1971) (failure to raise

ple, in *United States* v. *Byers*, 740 F.2d 1104, 1109 n.6 (D.C. Cir. 1984), now-Justice Scalia, writing for the D.C. Circuit, excused the defendant's failure to raise a Fifth Amendment claim below on the ground that under the existing law counsel "could well have thought the objection futile." *See also Byers*, 740 F.2d at 1132 n.52, 53 (Robinson, J., concurring) (collecting cases); *see generally* 3 W. LaFave & J. Israel *Criminal Procedure* 252 (1984) (courts "may also consider objections not raised at trial where an intervening ruling established the grounds for the objection and counsel's failure to raise the issue was understandable in light of the controlling precedent at the time of the trial"). In the instant case, as in *Byers*, defense counsel's failure to object below was properly excused because he "could well have thought the objection futile," *Byers*, 740 F.2d at 1109 n.6, in light of the Ninth Circuit precedent, the entrenched Hawaii practice, and his supervisor's past fruitless efforts to object to the same magistrate conducting voir dire.[6]

When the Court of Appeals in the case at bar held that respondent's objection was excused in light of the "solid wall" of contrary Ninth Circuit authority at the time of her trial, it simply applied that well-settled futility exception. Contrary to the government's implication, Pet. Br. 21-22, the "solid wall" principle is not an anomaly. Rather, to promote judicial econ-

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issue of unconstitutionality of statutory presumption, where only one circuit had so held, was "futile"); *O'Connor* v. *New Jersey*, 405 F.2d 632, 634 n.2 (3d Cir.) ("considering the law at the time of [the defendant's] trial, it would have been a futile gesture to have objected" to the evidence), *cert. denied, sub nom. Yeager* v. *O'Connor*, 395 U.S. 923 (1969).

[6] The government attempts to distinguish *Byers* on the ground that defense counsel had objected to the evidence albeit on other grounds. Pet. Br. at 25 n.14. This is a distinction without a difference because in applying the contemporaneous objection rule, courts have not distinguished between failure to object at all and failure to object on the proper grounds. *See* 3A C. Wright, *Federal Practice and Procedure* § 843 at p. 292-93 (1982) ("So, too if a specific objection on one ground is overruled, the party cannot raise some other ground for the objection on appeal") (citing cases).

omy as well as the interests of justice, this exception had been repeatedly affirmed by the Ninth Circuit for twenty years before the instant case was decided. *See United States* v. *Scott*, 425 F.2d 55, 57-58 (9th Cir. 1970) (en banc) (requiring futile objections to jury instructions will produce "unhappy result" of encouraging counsel "to burden district courts with repeated assaults on then settled principles"); *Guam* v. *Yang*, 850 F.2d at 512 n.8 (same); *Guam* v. *Ibanez*, 880 F.2d 108, 111 & n.2 (9th Cir. 1989) (same), *cert. denied*, 110 S. Ct. 2631 (1990).

Moreover, as petitioner concedes, the other courts of appeals have also recognized a futility exception in cases involving controlling adverse circuit court authority. *See United States* v. *Grant*, 489 F.2d 27, 29 (8th Cir. 1973) (because of "solid wall" of Eighth Circuit authority, objection below futile); *Martone* v. *United States*, 435 F.2d 609, 610-611 (1st Cir. 1970) (because of "solid wall" of circuit authority failure to object excused); *Liguori*, 438 F.2d at 665 (where only one circuit had held statutory presumption unconstitutional, but all others including Second had not, objection below "patently futile");[7] In fact, the exception's application to the instant case has not been criticized by any of the other circuit courts that have addressed the *Gomez* issue. Rather, each has distinguished *France* on the ground that, in each particular circuit, prior precedent was not solid, as it was in the Ninth. *See United States* v. *Lopez-Pena*, 890 F.2d 490, 497, Lexis 17515, 19 (1st Cir. 1989) ("[I]n this circuit, unlike in the Ninth, there was no 'solid wall of circuit authority'" which would render the objection futile), *withdrawn and reh'g granted* February 9, 1990; *Musacchia*, 900 F.2d at 502 ("In contrast [to the Second Circuit], the Ninth Circuit already had ruled in two cases decided four years prior

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[7] Inexplicably, the Second Circuit majority in *United States* v. *Musacchia*, 900 F.2d 493, 502 (2d Cir. 1990), denied that the Second Circuit had established an exception to the contemporaneous objection rule based on a "solid wall" of contrary authority. This denial, however, is contradicted by its earlier holdings in *United States* v. *Rivera*, 513 F.2d 519, 525-26 (2d Cir.), *cert. denied*, 423 U.S. 948 (1975), *Liguori*, 438 F.2d at 665, *Angelet*, 333 F.2d at 12, and the recognition of the doctrine in *Indiviglio*, 352 F.2d at 280 n.7.

to *Gomez*—certiorari had been denied in both—that magistrates were empowered to conduct voir dire").[8] In sum, the Court of Appeals properly held that objection by counsel was futile under Ninth Circuit law.

B. Any Objection At Respondent's Trial Would Have Been Futile In Light Of The Firmly Entrenched Hawaii Practice.

The United States concedes that there was controlling Ninth Circuit law rejecting precisely the challenge to magistrate *voir dire* later recognized by this court in *Gomez*. The government primarily argues, instead, that an objection by respondent

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[8] Contrary to petitioner's argument, at the time of respondent's trial the "wall" of adverse authority extended beyond the Ninth Circuit and consisted of much more than the "two bricks" of *Peacock* and *Bezold*. Pet. Br. 26 n.16. Although it is true that in *United States* v. *Rivera-Sola*, 713 F.2d 866 (1st Cir. 1983), the First Circuit held that having a magistrate preside was not plain error, the circuit, nevertheless, proceeded to praise the procedure and expressly approve it. *Id.* at 872-74. Indeed, Hawaii's Chief Judge expressly relied on *Rivera-Sola* in approving the Hawaii practice of delegating jury selection to magistrates and noted that the case "has specifically approved the use of magistrates to conduct jury selection." *See* Lodged Document C.

Yet another brick was put in place by *United States* v. *Ford*, 797 F.2d 1329, 1332 (5th Cir. 1986), *cert. denied*, 474 U.S. 1070 (1987), in which the Fifth Circuit also expressly approved the practice at issue. To be sure, at the time of jury selection in France's case, April 27, 1987, a petition for rehearing in *Ford* had been granted; but, rightly or wrongly, the parties still looked to *Ford* as precedent, just as the parties in the instant case, rightly or wrongly, have been citing *United States* v. *Lopez-Pena*, even though it has been withdrawn pending an en banc decision. Only the Second Circuit in *United States* v. *DeFiore*, 720 F.2d 757 (1983), *cert. denied*, 467 U.S. 1241 (1984), expressed no opinion on the practice other than that the error, if any, was not "plain." But nothing in *DeFiore* suggested that the Second Circuit would not approve the practice in the future even over objection, as in fact it later did in *United States* v. *Garcia*, 848 F.2d 1324 (2d Cir. 1988), *rev'd sub nom. Gomez*.

might not have been futile because Ninth Circuit law only approved—rather than required—such action, and the trial court might have chosen to select the jury in this particular case. Pet. Br. 11. This argument is simply not correct. As noted above, the United States' own affidavit filed in the court below established that, since the mid-1980's, the District of Hawaii practice had been such that magistrates had been assigned to preside over "virtually all jury selection proceedings." Pet. App. 13a. And, as also established above, the Chief Federal Public Defender as well as his assistant, respondent's trial counsel, repeatedly challenged the practice, only to have their objections overruled at trial and by the Ninth Circuit.[9]

By the time of respondent's trial, no further purpose was served by continuing to object over and over, since the District Court was fixed on its practice, and its practice had twice been

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[9] The only alleged exception in the Ninth Circuit cited by the government is the Hawaii case *United States* v. *Rewald*, Cr. No. 84-2417 (D. Haw. Dec. 9, 1985), Pet. Br. 26. *Rewald* does not assist the petitioner for two reasons. First, the jury in *Rewald* was selected by Chief Judge Fong on August 5, 1985, *before* certiorari was denied in either *Peacock* or *Bezold*. *See* Lodged Document E (Docket Sheet Excerpt from *United States* v. *Rewald*). Thus, at the time of Rewald's trial, the wall was "rather porous." *See Lopez-Pena*, Lexis 17515 at 21.

Second, as respondent pointed out in her brief opposing certiorari, it was the *government*, as well as the defense, who objected to the magistrate conducting jury selection. In its certiorari reply brief the government conceded this point. Pet. Reply Br. 2 n.1 (in the *Rewald* case "the *parties*" persuaded the district judge to select the jury). In its current brief, however, it has apparently overlooked this concession. Of course when the government objects to a procedure, as it did in *Rewald*, it can hardly now argue that the objection was sustained because of the defendant's objection. *Cf. Gomez*, 109 S. Ct. at 2245 ("In criminal cases the government may petition for trial before a district judge"); *United States* v. *Sayeedi*, 903 F.2d 88, 91 (2d Cir. 1990) (magistrate may not conduct voir dire over government's objection).

sustained on appeal and through certiorari to this Court.[10] This conclusion is confirmed by the decision in *United States* v. *Baron*, 721 F. Supp. 259 (D. Haw. 1989), appeal pending, where the district court found in yet another case that objection by the Public Defender to jury selection by Magistrate Tokairin "would have been futile." *Id.* at 262. The court found that the Public Defender "has objected to this practice in other cases and has appealed the denial of such objection without success." *Id.* And, finally, the fact that respondent's counsel believed the objection to be futile—and was not "sandbagging," as the government hypothesizes—is proven by the fact that counsel did *not* raise this issue in the Court of Appeals until *after* this Court's decision in *Gomez*.

In sum, this case fits squarely within the class of cases where a contemporaneous objection would have been futile. Trial counsel's earlier fruitless objections before Magistrate Tokairin prove the futility of yet another objection in the case at bar. They also refute the government's unfounded speculation that trial counsel might have "prefer[red]" Magistrate Tokairin in the instant case and was "quite happy" with the Magistrate.[11] Pet. Br. 28.

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[10] It is, of course, true that the Court has repeatedly stated that the denial of certiorari does not suggest in any way how the Court views the merits of a case. Nevertheless, where the Court has twice denied certiorari on the same issue from the same circuit, defense counsel would not act unreasonably in inferring that the Court was not about to question the soundness of the Hawaii practice. *See Griffin* v. *United States*, 336 U.S. 704, 716-717 (1949) (repeated denial of certiorari implies recognition of circuit's right to formulate rules of evidence); *Smith* v. *Smith*, 454 F.2d 572, 579 n.4 (5th Cir. 1971) (denial of certiorari and other actions of the Court made it "patently obvious" that the Court approved circuit holdings), *cert. denied*, 409 U.S. 885 (1972); *Snider* v. *Peyton*, 356 F.2d 626, 627 n.5 (4th Cir. 1966) (under some circumstances denial of certiorari "lends some support" to conclusion that constitutional question is not present).

[11] The government asserts that Cassiday "expressed satisfaction with the procedure by which the jury was selected." Pet. Br. 6. It is true that in response to the magistrate's question whether Cassiday objected to anything "in the manner in which the jury was selected," Cassiday said, "no." J.A. 54. However, in view of Cassiday's history with the entrenched Hawaii practice, the answer must be understood in the context of his unwillingness to raise a futile objection to the magistrate's jurisdiction.

Moreover, the government's emphasis on counsel's state of mind proves too much. Even when an attorney objects to a procedure, the objection does not necessarily mean that he really prefers something different. He may object in any event, knowing the objection will be overruled, in order to have an issue on appeal. For this reason, courts do not look to the subjective belief of the attorney but rather to what a reasonable attorney could have believed in view of the existing law. *See Byers*, 740 F.2d at 1109 n.6.

This Court has also recognized that the practice of the district court can be such as to render an objection futile in practice if not in law. For example, in *Osborne* nothing in the law would have compelled the state judge to refuse to give the jury instruction at issue if the defense attorney had requested it. Nevertheless, the Court found that any such request would have been "patently futile." *Osborne*, 110 S. Ct. at 1705 (quoting *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965)). Similarly, in *Reed*, had defense counsel asked for the jury instruction on the burden of proof, nothing would have compelled the trial judge to refuse to give it.

The circuit courts have also applied the same principle with respect to an entrenched district court practice. For example, in *Hernandez* v. *Beto*, 443 F.2d 634 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971), counsel failed to object to his client's being tried in jail clothes. Obviously nothing in the law *required* the trial judge to try the defendant in jail clothes. Nevertheless, the Court of Appeals excused the failure to object on the ground that because such trials were the court's "common practice," any such objection was apparently futile. *Id.* at 636.

Also illustrative is *United States* v. *Rivera*, 513 F.2d 519 (2d Cir.), *cert. denied*, 423 U.S. 948 (1975), in which the defendant "specifically stated he had no objection" at trial to the admission of the grand jury transcript of the testimony of a witness. *Id.* at 525. Nevertheless, on appeal the defendant claimed the

admission was error. Although nothing in the law required the judge to admit the transcript, the court of appeals rejected the government's argument that the failure to object below barred appellate review. The Court reasoned that in light of the circuit's earlier precedent, counsel "could have considered objection futile so far as the district judge or this court were concerned . . . ." *Id.* at 526. In the case at bar, as in *Rivera*, respondent "could have considered objection futile" both as far as the district court and the Ninth Circuit were concerned.[12]

Thus, the instant case stands in stark contrast to a case in which objection is not futile because the trial court has made clear that it would act favorably on the defendant's objection. In that situation, where the defendant nevertheless does not object, true forfeiture occurs. *See Estelle* v. *Williams*, 425 U.S. 501 (1976) (where Court made clear that it would permit defendant to be tried in civilian clothes, failure to object to trial in jail clothes waived the issue). For this reason, the government's reliance on Justice Powell's concurrence in *Estelle* is misplaced. In his opinion Justice Powell stated that counsel should not be allowed "deliberately to forgo objection to a curable trial defeat, even though he is aware of the factual and legal basis for an objection simply because he thought objection would be futile." *Id.* at 515. This statement must, of course, be read in connection with the facts of *Estelle* where objection was obviously not futile because it was clear that *had* the objection been made, it would have been acted upon. Justice Powell was saying only that a mere belief by counsel which is not objectively founded on any entrenched practice or wall of authority cannot constitute futility. In the case at bar, by contrast, Cassiday's belief *was* objectively founded.

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[12] *See also United States* v. *Clark*, 475 F.2d 240, 247 n.6 (2d Cir. 1973) (failure to object to defendant's absence did not waive Sixth Amendment issue because an objection "may have appeared [to counsel] to be futile"); *cf. Callanan*, 881 F.2d at 231 (where issue of application of mail fraud statute "appeared to be settled," counsel showed "cause" for not raising it).

C. This Court Should Defer To The Court Of Appeals' Assessment Of The Effect Of Its Precedent And Of The Local Practice.

The Court of Appeals' assessment of the effect of its precedents *Peacock* and *Bezold*, and of the local practice of the Hawaii district court, a district within the circuit, is a matter peculiarly within the province of the Ninth Circuit, to which this Court should defer as it has with similar matters. *See Henderson* v. *United States*, 476 U.S. 321, 328 n.9 (1986) (interpretation of district's local rule is "a matter on which we should defer to the Court of Appeals for the Ninth Circuit"). Deference is appropriate if only because the Ninth Circuit is "in closer touch with the facts and factors presented in the workings of the regular activities of the district courts within a circuit." *Ehrlichman* v. *Sirica*, 419 U.S. 1310, 1311 (1974) (Burger, C.J., sitting as Circuit Justice). Given this deference it is clear that the decision below should be affirmed, since the circuit's assessment is supported by ample evidence as already described.

D. The Habeas Corpus Doctrine Of Futility Is Inapplicable Here Because There Are No State-Federal Comity Concerns.

The government relies heavily on the Court's statement in *Engle* v. *Isaac*, 456 U.S. 107, 130 (1982), that the "futility of presenting an objection to the *state* courts cannot alone constitute cause for a failure to object" (emphasis added). Pet. Br. 11. Respondent, however, is on direct appeal from a federal conviction, not on habeas corpus from a state conviction. Thus she need not meet the demanding "cause and prejudice test." *See United States* v. *Frady*, 456 U.S. 152 (1982). The habeas test is strict, for it is designed to ensure that a defendant "may not bypass the state courts." *Engle*, 456 U.S. at 130. There is, after all, a strong interest in comity between state and federal systems which the "cause and prejudice" test promotes. As stated in *Engle*:

> [T]he Great Writ imposes special costs on our federal system. The States possess primary authority for defining

> and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders. . . .

Id. at 128; *cf. Rose* v. *Lundy*, 455 U.S. 509, 518 (1982) ("it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct an unconstitutional violation"). Because the comity concerns of *Engle* have no application to the case at bar, the quote from *Engle* is wholly inapplicable.

Although respondent need not meet the strict "cause" test, she arguably does so in any event. The government concedes that failure to raise a claim or object in the state trial court will be excused on habeas corpus in federal court if the claim was contrary to "a longstanding and widespread practice to which the Court has not spoken, but which a near unanimous body of lower court authority has expressly approved." Pet. Br. 23 (quoting *Reed*, 468 U.S. at 17). The instant case arguably falls within this exception because, as previously stated, at the time of respondent's trial, jury selection by a magistrate was "expressly" or implicitly approved by every court that had considered the matter.

E. Strong Policy Reasons Of Judicial Economy And Fairness To The Accused Support The Decision Below.

Judicial economy and the interests of justice strongly support application of the narrow futility exception to the facts of this case. The government's brief sets forth the justifications for the contemporaneous objection rule codified in Fed. Rule Crim. P. 51: judicial economy and fear of sandbagging. Neither of these goals is furthered, however, when an objection is futile, as the United States expressly admits in its brief. Pet. Br. 24. To the contrary, as in the instant case, those goals are actually frustrated.

It is true, as the government suggests, Pet. Br. 27, that the raising of an objection often promotes judicial economy by

leading the parties to a "compromise" which satisfies the defendant and avoids an appeal. Because of Hawaii's firmly entrenched policy, however, no compromise in the instant case was possible. Sandbagging is also not of concern where, as here, the failure to object was a result of futility. Furthermore, as previously mentioned, there was clearly no sandbagging because respondent did not even raise the magistrate issue on appeal until after *Gomez* was decided some two years after the trial.

In fact, judicial economy strongly militates in favor of not applying the contemporaneous objection rule in the case at bar. Forcing trial counsel to make a futile objection would needlessly cost time for the trial and appellate court to consider and reject the issue. As concisely summarized by the Ninth Circuit:

> [W]ere we to insist that an exception be taken to save the point for appeal, the unhappy result would be that we would encourage defense counsel to burden district courts with repeated assaults on then settled principles out of hope that those principles will be later overturned, or out of fear that failure to object might subject counsel to a later charge of incompetency.

Scott, 425 F.2d at 57-58; *see also Ingber*, 841 F.2d at 454 ("Such a rule would encourage appeal of even well-settled points of law"); *Callanan*, 881 F.2d at 231 ("cause" requirement of *Frady* should not be applied in a way that would encourage counsel to relitigate well-settled point of law). In *Reed* this Court recognized the same point, albeit in justifying failure to raise arguments on direct appeal from a state conviction instead of at trial. There this Court approvingly quoted Judge Haynsworth's opinion in the court of appeals below, which feared that:

> counsel on appeal would be obliged to raise and argue every conceivable constitutional claim, no matter how far fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law. Appellate courts are already overburdened with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be

> encouraged to limit their contentions on appeal at least to those which may be legitimately regarded as debatable.

Reed, 468 U.S. at 16 (quoting *Ross* v. *Reed*, 704 F.2d 705, 708 (4th Cir. 1983),*aff'd*, 468 U.S. 1 (1984)). The same logic applies to raising arguments at trial, as the Court has suggested in *Engle*, 456 U.S. at 131 (we should not "require trial counsel . . . to object to every aspect of the proceedings").

In fact, to force counsel to raise apparently futile objections, as in the instant case, would open the flood gates both at trial and on appeal to meritless claims because, in the words of Judge Haynsworth, counsel "would be obliged to raise and argue every conceivable constitutional claim no matter how far fetched." This consequence would greatly add to the workload of the already overburdened judiciary and would contravene one of the goals of the Rules of Criminal Procedure: the promotion of efficiency. *See* Fed. R. Crim. P.2.

Fairness and the interest of justice are the overreaching concerns of the Rules of Criminal Procedure. *Id.* These interests are advanced in the instant case by excusing counsel's failure to object. In all fairness, respondent should not be punished because her trial counsel could not foresee this Court's opinion in *Gomez*, which overruled the prevailing law in the Ninth Circuit. As Judge Minor wrote in *Ingber*: "Were we to penalize Ingber for failing to challenge such entrenched precedent, we would ascribe to attorneys and their clients the power to prognosticate with greater precision than the judges of this court." *Ingber*, 841 F.2d at 454. In holding that respondent should not be penalized for her counsel's failure to "guess that the law would change some time after the error was committed," Pet. App. 10a, 11a, the Ninth Circuit simply affirmed that trial counsel need not have "extraordinary vision." *Hopkinson* v. *Shillinger*, 888 F.2d 1286, 1289 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 3256 (1990) (quoting *Engle*, 456 U.S. at 131); *see Pierce Packing Co.* v. *John Morrell*, 633 F.2d 1362, 1365 (9th Cir. 1980) ("a party should not be penalized for failing to anticipate a change in the controlling law").

Penalizing respondent for not objecting would be unfair in another respect. This Court has recently held that state courts

are entitled to rely in good faith on existing federal precedent and should not suffer from a subsequent change in federal law. *Butler* v. *McKellar*, 110 S. Ct. 1212, 1217 (1990) (citing *United States* v. *Leon*, 468 U.S. 897, 918-919 (1984)). Just as courts and law enforcement officers are entitled to rely in good faith on existing precedent, so should respondent's trial counsel. When he, entirely reasonably, declined to press a claim which under existing precedent he "could well have thought . . . futile," *Byers*, 740 F.2d at 1109 n.6, his client should not suffer for his lack of "extraordinary vision."[13]

More generally, in the interests of justice the Ninth Circuit properly exercised its discretion to reach the issue on appeal notwithstanding respondent's failure to object. The circuits have also exercised this same discretion to relieve the govern-

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[13] Petitioner has asserted that "hundreds of convictions" from across the country will be affected if the decision is affirmed. Reply Br. 4. Respondent has questioned, Resp. Opp. Cert. 13, 14, and continues to question the accuracy of this assertion. First, the decision below, along with the other circuits that have addressed the issue, holds that *Gomez* is retroactive only to federal cases on direct review at the time *Gomez* was decided. Pet. App. 8a. Thus, only cases on appeal within a narrow time frame will be affected.

Second, and most importantly, *only* the Ninth Circuit, in light of its precedent, has applied the futility doctrine to a failure to object to a magistrate selecting the jury. Every other circuit that has addressed the issue has found no futility in light of the law prevailing in its circuit. In its reply brief seeking certiorari the government disputed this and asserts that the futility issue "will also affect a number of convictions in the Second Circuit." Reply Br. 3. In the same brief, however, the government implicitly contradicted its assertion by citing the most recent Second Circuit law which finds no futility in light of its prior precedent. Reply Br. 2 (citing *Musacchia*, 900 F.2d 493). Thus, the government's concerns are unfounded. In fact, even within the Ninth Circuit it appears that a relatively small percentage of cases will be affected, *see* Br. Opp. Cert. 13, which will consist primarily of the Hawaii cases specified in the government's brief for certiorari. Pet. App. 13a. Indeed, the affirmance here could well affect only the instant case and such few others where trial counsel, as here, had fruitlessly objected to the same magistrate in the past.

ment from its obligation under the contemporaneous objection rule. *See United States* v. *Hayden*, 860 F.2d 1483, 1485 (9th Cir. 1988) (even though government did not raise legal issue below court will decide it); *United States* v. *Bernhardt*, 840 F.2d 1441, 1445 (9th Cir.) (within court's supervisory powers to allow government to challenge magistrate's recommendation on appeal, even though it did not object below), *cert. denied*, 109 S. Ct. 389 (1988); *see also United States* v. *Miller*, 636 F.2d 850 (1st Cir. 1980) (government may raise standing issue on appeal although it did not object below); *United States* v. *Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981) (government's failure to object below to magistrate's recommendation is excused because new rule prohibiting appeal absent objection could not be anticipated).

Finally, it may well be true, as the government suggests, Pet. Br. 27, that a defense advocate must be willing to object even when he knows that the court will overrule his objection. Perhaps he must even object even when he knows that the court's anger will be aroused, or even that he might face sanctions. *See In Re Becraft*, 885 F.2d 547, 550 (9th Cir. 1989) (criminal defense lawyer fined $2,500 for filing frivolous petition for rehearing raising arguments repeatedly rejected by the court). Even the most vigorous advocate, however, might stop striking his head against a "solid wall," especially if he reasonably perceived at the time that what might break was not the wall, but his or his client's head. *Cf. Agee* v. *Lofton*, 287 F.2d 709, 710 (8th Cir. 1961) (counsel are "loath to challenge the propriety of a trial judge's utterances, for fear of antagonizing him and thereby prejudicing a client's case"). Thus, the judgment below should be affirmed.[14]

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[14] By not arguing to the contrary, the government appears to concede that if objection was futile the Court of Appeals was correct in reversing the conviction. This concession is proper because, having found an objection futile, all courts treat the matter as if the objection had been made. Hence, reversal of the instant case follows automatically from *Gomez*.

II. EVEN IF OBJECTION WAS NOT FUTILE, THE CONTEMPORANEOUS OBJECTION RULE DOES NOT APPLY HERE BECAUSE THE ERROR WAS JURISDICTIONAL AND NOT SUBJECT TO WAIVER.

A. The Magistrate Had No Statutory Jurisdiction To Select The Jury In This Felony Case, And The Defect Was Not Waivable.

The Ninth Circuit reversed the conviction below on the alternative ground that the jurisdictional holding of *Gomez* created a "broad, definitive rule" not dependant on lack of objection. Pet. App. 9a. The Court of Appeals noted that in *Gomez* this Court had unanimously held that Congress withheld from magistrates jurisdiction to select a jury in a felony case. When the magistrate nevertheless did so, respondent was deprived of her "basic" right "to have all critical stages of criminal trial conducted by a person with jurisdiction to preside." Pet. App. 6a n.1 (quoting *Gomez*, 109 S. Ct. at 2248).

In holding that lack of objection below was irrelevant to raising a jurisdictional issue, the Court of Appeals implicitly followed the well-settled principle that lack of objection does "not waive" a jurisdictional error. *Insurance Corp. of Ireland* v. *Compagnie des Bauxites le Guinee*, 456 U.S. 694, 702 (1982); *see* Fed R. Crim. P. 12(b)(2) (jurisdictional errors may be raised any time). This is because the subject matter jurisdiction of the magistrate is limited to "those subjects encompassed within a statutory grant of jurisdiction." *Insurance Corp. of Ireland*, 456 U.S. at 701; *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 109 S. Ct. 683, 687 (1989). Obviously, respondent's failure to object below could not confer the subject matter jurisdiction on the magistrate that Congress withheld, for where there is no jurisdiction even the express consent of the respondent would be "irrelevant." *Id.* at 702; *see Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (even if parties concede jurisdiction, appellate court has special obligation to satisfy itself that lower court had jurisdiction). As succinctly stated by then-Justice Rehnquist, "parties may not confer jurisdiction . . . by stipulation." *California* v. *LaRue*, 409 U.S. 109, 113 n.3 (1972).

Therefore, in the instant case, there is "little difficulty" in concluding that the error here was jurisdictional and thus is "immunized from the general rule of waiver." *Government of the Virgin Islands* v. *Williams*, 892 F.2d 305, 309 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 2211 (1990).[15] Under *Gomez*, a magistrate simply "has no power to select a jury in a felony case with or without the defendant's consent." *United States* v. *Mang Sun Wong*, 884 F.2d 1537, 1546 (2d Cir. 1989) (Altimari, J., dissenting), *cert. denied*, 110 S. Ct. 1140 (1990).

The government argues that when this Court used the term "jurisdiction" in *Gomez*, as it did throughout its opinion, it did not really mean "jurisdiction." Pet. Br. 19, 20. Petitioner argues that this Court meant only that the district court had no "authority" to delegate jury selection to a magistrate. Pet. Br. 19. And the government contends that participation of the magistrate in the jury selection, albeit unauthorized, was not "so inconsistent with our shared notions of procedural regularity" as to void the judgment of conviction absent objection below. Pet. Br. 21.

This argument is flawed for two reasons. First, even if jurisdiction" meant "authority," the result is no different. Jurisdiction and power and authority are the same thing for these purposes. *See Bender*, 474 U.S. at 541; *Insurance Corp.*, 456 U.S. at 701-02. As applied here, respondent was still deprived

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[15] Although the court in *Williams* excused the failure to object for purposes of review, it nevertheless erroneously held that, because of the lack of objection, there was no error. The court reasoned that "[n]o statute of which this Court is aware prohibits federal magistrates from conducting voir dire when a defendant consents." *Id.* at 310. This reasoning is erroneous, however, because in *Gomez* this Court held that Congress *withheld* jurisdiction from magistrates to select juries. Thus failure to object obviously cannot confer the jurisdiction that Congress has withheld, because "[i]n origin and design, federal courts are courts of limited jurisdiction. . . ." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 692 (1986) (Stevens, J., dissenting). Therefore, a magistrate can exercise "only the authority conferred on him by Art. III *and* by congressional enactments pursuant thereto." *Id.* (emphasis added).

of her right to have "lawful judicial authority" preside at her jury selection. *Burnham* v. *Superior Court of California*, 110 S. Ct. 2105, 2109 (1990) (Scalia, J.). Because jury selection, a critical part of respondent's felony trial, took place "before a person not [an authorized] judge . . . the proceeding was not a judicial proceeding." *Id.* Hence the jury was "not legitimate." *United States* v. *Lopez-Pena*, 890 F.2d at 500, Lexis 17515 at 30 (Aldridge, Senior Judge, dissenting). As a result, the jurisdictional defect in the instant case, which resulted in an illegitimate jury, must necessarily render the verdict void. *See Peters* v. *Kiff*, 407 U.S. 493, 502 (1972) ("Illegal and unconstitutional jury selection procedure cast doubt on the integrity of the whole judicial process").

Second, regardless of the terms used, the government has conceded that "even with the consent of the parties," a court could not delegate trial functions to a "panel of citizens." Pet. Br. 20, 21. Petitioner concedes that such a delegation would be a "flagrant departure from traditional procedure." *Id.* But to concede this is to concede that the "panel" has no jurisdiction to act, regardless of consent. If the ensuing judgment cannot stand when the judge delegates the trial function to the "panel," it likewise cannot stand when the judge delegates to the "panel" the process of jury selection, a critical part of that trial. Moreover, if delegation of jury selection to the "panel" voids the judgment, so does delegation to the magistrate, for "the magistrate was as much a legal stranger to the judicial process that determined the outcome of this proceeding as would have been a bystander called in from the street." *Archie* v. *Christian*, 808 F.2d 1132, 1138 (5th Cir. 1987) (en banc) (Clark, C.J.; dissenting).

In other words, "shared notions of procedural regularity" as well as Article III are violated by having the magistrate select the jury, because both require at a minimum that respondent have her jury selected by a competent court, not by a "panel of citizens" or by a magistrate. After all, competency of the tribunal has always been a bedrock element of procedure whose absence voids a judgment *ab initio*. *Burnham*, 110 S.Ct. at 2109. This ancient principle "traces back to the English Year

Books." *Id.*; *see McClaughry* v. *Deming*, 186 U.S. 49, 69 (1902) (where "the court was illegally constituted . . . [it] had no jurisdiction over the person of the defendant or the subject-matter of the charges against him. . . ."). Petitioner's suggestion that it is unfair or "unwise" that respondent gains a reversal even though she did not object to jurisdiction below, Pet. Br. 8, must also be rejected because when subject matter jurisdiction is lacking, even "principles of estoppel do not apply." *Insurance Corp. of Ireland*, 456 U.S. at 702. In short, because the jurisdiction rule "is inflexible and without exception," *id.*, the result in *France* is correct.

Relying on *United States* v. *Wey*, 895 F.2d 429, 431 (7th Cir.), *cert. denied*, 110 S.Ct. 3283 (1990), the government argues that because an Article III judge presided over the remainder of respondent's trial and entered the judgment of conviction, the conviction should stand. Pet. Br. 20 n.12. This argument, however, simply begs the question whether an Article III judge has jurisdiction to enter a valid judgment when the defendant was deprived of a competent judge at the critical stage of jury selection. By the government's logic an Article III judge could delegate to a "panel of citizens" or the magistrate the conduct of the whole trial; and, so long as he returned to enter the judgment, the proceeding would be lawful. This "trial," however, would surely be a "flagrant departure from traditional procedure" and a violation of our "shared notions of procedural regularity," because respondent was entitled to have a competent tribunal "in the first instance." *See Ward* v. *Village of Monroeville*, 409 U.S. 57, 61-62 (1972) (availability of trial *de novo* irrelevant because petitioner entitled to unbiased judge "in the first instance," and no prejudice need be shown); *see also Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1938) (presence of defense counsel is an "essential jurisdictional prerequisite" to a court's authority to convict a defendant, and the "court's jurisdiction at the beginning of the trial may be lost in the course of the proceedings [if counsel is not provided]"); *Matter of Hipp, Inc.*, 895 F.2d 1503, 1519 (5th Cir. 1990) ("The fact that the initial [bankruptcy] proceeding lacked a constitutionally competent adjudicator may . . . be fatal").

That the error at issue is a fundamental jurisdictional error which voids the conviction also follows from the Court's having

equated the error in having the magistrate select the jury to that in being deprived of an "impartial adjudicator, be it judge or jury." *Gomez*, 109 S. Ct. at 2248. Respondent has a constitutional right to an impartial judge. *Marshall* v. *Jerrico*, 446 U.S. 238, 242 (1980); *see Rose* v. *Clark*, 478 U.S. 570, 577 (1986) ("The state of course must provide a trial before an impartial judge"). When this right is violated, reversal follows regardless of lack of objection. *See Rocha* v. *Great American Insurance Co.*, 850 F.2d 1095, 1100 (6th Cir. 1988) (judge's prejudicial comments constituted "plain error"); *United States* v. *Lanham*, 416 F.2d 1140, 1143-44 (5th Cir. 1969) (judge's taking over the prosecution by examining witnesses was "plain error"). Therefore, just as in the case of a biased judge, reversal also follows when a magistrate selects the jury, and the decision below should be affirmed.

B. Respondent Was Deprived Of Her Non-Waivable Right To Have An Article III Judge Preside At Jury Selection.

In addition to having a person without jurisdiction preside at jury selection, respondent was deprived of her right to have an Article III judge preside at jury selection, a critical stage of her felony trial. This was a jurisdictional error of the first magnitude because criminal matters are at the "protected core" of Article III. *Northern Pipeline Construction* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 71 n.25 (1982); *see Schor*, 478 U.S. at 853 (the "core" or "ordinary powers of the district courts" include "presid[ing] over jury trials or issu[ing] writs of habeas corpus"); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 606 (1962) (Douglas, J., dissenting) (Article III judges, not others, are chosen for their qualifications to sit in cases involving the "vast interests" of life and liberty).[16] Obviously, the right to an Arti-

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[16] Generally speaking, a litigant in a civil case has a constitutional right to have an Article III Judge preside at trial. *Commodity Future Trading Comm'n* v. *Schor*, 478 U.S. 833, 848 (1986); *see Pacemaker Diagnostic Clinic of America* v. *Instromedix*, 725 F.2d 537, 541 (9th Cir.) (en banc) (opinion by now-Justice Kennedy) (subject to certain exceptions, a litigant has a "personal right . . . to demand Article III adjudication of a civil suit"), *cert. denied*, 469 U.S. 824 (1984). In a civil case this constitutional right may be waived. *Schor*, 478 U.S. at 849.

cle III judge must also be guaranteed at jury selection, a critical stage of the felony trial.

To be sure, even in a criminal case a non-Article III officer may preside over a pretrial matter like a suppression hearing. *United States* v. *Raddatz*, 447 U.S. 667, 678-79 (1980). But jury selection is not a pretrial matter, but rather, as this Court unanimously held in *Gomez*, a "critical stage[] of a criminal trial" itself. *Gomez*, 109 S. Ct. at 2248. Hence to have a magistrate preside at jury selection was to deny respondent her constitutional right to an Article III judge.

The right to have an Article III judge at jury selection also arises from the right to a jury trial itself, guaranteed by both Article III, § 2, cl. 3 and the Sixth Amendment.[17] Indeed, that the guarantee to a jury trial was placed within Article III, even before the Sixth Amendment was ratified, suggests that the Framers envisioned that a lawful and duly constituted "jury" presupposes and necessitates an Article III judge in superintendence. Thus, the Court has said that "trial by jury . . . in the American Constitutions is not merely a trial by a jury of twelve men before an officer vested with [certain] authority . . . but it is a trial by a jury of twelve men, *in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts*. . . ." *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13-14 (1899) (emphasis added). Respondent contends, therefore, that to be legitimately constituted under Article III, a jury must necessarily be "under the constant superintendence of the [Article III] trial judge." *Crowell* v. *Benson*, 285 U.S. 22, 61 (1932). If the Article III

[17] Article III, § 2, cl. 3 provides in pertinent part that "The Trial of all Crimes . . . shall be by Jury." The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." The right of trial by jury is the most "priceless" safeguard to individual liberty. *Irvin* v. *Dowd*, 366 U.S. 717, 721 (1961). It is "so important to liberty of the individual that it appears in two parts of the Constitution," Article III itself and the Sixth Amendment. *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 16 (1955).

right to a jury trial necessarily includes the right to have an Article III judge preside at that trial, it follows that an Article III judge must also preside at jury selection, a "critical" stage of the trial. *Gomez*, 109 S. Ct. 2248.[18]

Assuming the Court accepts the conclusion that respondent had a right to have an Article III judge preside at jury selection, the right was not waivable because it is a jurisdictional and "structural" right that underlies Article III. *Cf. Schor*, 478 U.S. at 850-51. To be sure, in a civil case a litigant can waive his personal right to an Article III judge if he does so knowingly and voluntarily. *Id.* Even in a criminal case a defendant can waive his right to a lawyer, to a trial by jury, or, by pleading guilty, to any trial at all. It does not follow, however, that having elected a jury trial, respondent can then waive her right to have

[18] If, as argued earlier, an Article III judge could assign jury selection to a magistrate then the judge could assign him other critical trial functions as well. This could not have been the Framers' intention under Article III. As Blackstone wrote long ago, when speaking of the dangers of "new" procedures more "convenient" than the jury trial,

> the liberties of England cannot but subsist so long as this *palladium* remains sacred and inviolate, not only from all open attacks . . . [but from] new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue and courts of conscience. And however *convenient* these may appear at first . . . yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price free nations must pay for their liberty in more substantial matters . . . and that, though begun in trifles, the precedent may gradually increase and spread. . . .

4 W. Blackstone, *Commentaries on the Laws of England*, Ch. 27, 343-344 (Legal Classics Library, 1983 reprint of 1769 ed.) (emphasis in original). The Court has adopted Blackstone's philosophy and has said that "the fact that a . . . procedure is efficient, convenient, and useful . . . will not save it if it is contrary to the Constitution." *Bowsher* v. *Synar*, 478 U.S. 714, 736 (1986) (quoting *INS* v. *Chadha*, 462 U.S. 919, 944 (1983)). Therefore, as applied to the instant case, the "new" method of jury selection by a magistrate, however convenient or useful, undermines the right to trial by jury, guaranteed by both Article III and the Sixth Amendment, and it cannot constitutionally be countenanced.

an Article III judge preside at a critical stage of that trial, because there is a paramount structural interest underlying Article III that is simply beyond her power to waive. *Cf. Wheat* v. *United States*, 486 U.S. 153, 160 (1988) (defendant may not waive her right to conflict free defense counsel because "federal courts have an independent interest in ensuring . . . that legal proceedings appear fair to all who observe them").

This Court has stated that a litigant cannot waive the "structural" protection that underlies Article III because it is "an inseparable element of the constitutional system of checks and balances." *Schor*, 478 U.S. at 850 (quoting *Northern Pipeline*, 458 U.S. at 58). The Court observed that "[t]o the extent this structural principle is implicated in a given case" the parties cannot waive the defect "for the same reason that the parties by consent cannot confer on federal courts subject matter jurisdiction beyond the limitations imposed by Article III, § 2." *Schor*, 478 U.S. at 850-51. Although the Court was speaking in the context of congressional attempts to undermine Article III Courts, the Court's concerns speak with equal force to a district court's efforts to strip itself of authority by delegating critical criminal trial functions to a "panel of citizens" or a magistrate. This is so because the Framers "intended to safeguard the people of this country from punishment without trial by duly constituted courts." *Glidden Co.*, 370 U.S. at 601 (Douglas J., dissenting) (quoting *United States* v. *Lovett*, 328 U.S. 303, 317 (1946)); *cf. People* v. *Ahmed*, 66 N.Y.2d 307, 311, 487 N.E.2d 984, 986, (1985) (conviction reversed where trial judge delegated duty of answering juror's questions to his legal secretary even though defendant consented, because right to jury trial impaired).

There is, moreover, a "powerful and independent constitutional interest in fair adjudicative procedure." *Marshall* v. *Jerrico*, 446 U.S. at 243. This interest is promoted by Article III adjudication and is at its strongest in a felony trial. In fact, respondent contends that without the basic, structural protection of an impartial Article III judge presiding over all critical stages of a felony trial "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence."

Rose v. *Clark*, 478 U.S. at 577-578; *see Glidden Co.*, 370 U.S. at 601.

The government itself once took a similar view with respect to the magistrate's subject matter jurisdiction over misdemeanor offenses. In speaking against the constitutionality of the Magistrates Act of 1968 which authorized magistrates to try misdemeanors upon consent of the defendant, Fred Vinson Jr., Assistant Attorney General in the Criminal Division of the Department of Justice, testified before Congress that the Department was of the opinion:

> that a waiver in this situation is a nullity. We are here concerned basically with subject matter jurisdiction which cannot be waived. Since Article III was designed to protect the interest of the public at large in the integrity of the judicial process, trial by an Article III judge is guaranteed and cannot be waived by an individual defendant . . . I might add that this infirmity would be subject to attack at any stage of the proceeding. . . .

Federal Magistrates Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 109 (1966); *see also* H.R. Rep. No. 1629, July 3, 1968, *reprinted in* 1968 U.S. Code Cong. & Admin. News 4264 (summarizing Mr. Vinson's views). The government's argument applies with even more force to a defendant's attempt to waive her right to an Article III judge at a "critical" stage of a felony trial.

In sum, where, as in the instant case, Article III limitations are at issue, "notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Schor*, 478 U.S. at 851. Thus respondent could not waive her right to have an Article III judge preside at jury selection, and the decision below should be affirmed.[19]

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[19] As argued in part IV of this brief, even assuming, *arguendo*, that respondent's Article III right could be waived, at the very least a knowing and express waiver from respondent herself was necessary. Failure of counsel to object is not sufficient.

III. THE CONTEMPORANEOUS OBJECTION RULE DOES NOT APPLY HERE BECAUSE THE ERROR WAS "PLAIN."

The opinion below should also be affirmed on the basis that the error at issue is "plain."[20] Of course, the "plain error" exception is narrow and only to be used sparingly. Nevertheless, as the government concedes, it is applicable to an error that "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Pet. Br. 14 (citing *United States* v. *Young*, 470 U.S. 1, 15 (1985)). The instant case falls precisely within this doctrine because as previously stated "illegal" jury selection procedures "cast doubt on the integrity of the judicial process," *Peters* v. *Kiff*, 407 U.S. at 502, and "[i]mproper jury selection can undermine pubic confidence in the judicial process." *United States* v. *Trice*, 864 F.2d 1421, 1427 (8th Cir. 1988), *cert. dismissed*, 109 S. Ct. 3206 (1989).

In the instant case the unauthorized delegation of jury selection to a magistrate may well have devalued if not "demean[ed]" the process of jury selection in the jury's eyes. *Garcia*, 848 F.2d at 1337 (Oakes, J., dissenting). As recently stated by the Seventh Circuit, even a civil trial is "diminished" when a magistrate selects the jury. *Olympia Hotels Corp.* v. *Johnson Wax*, slip. op. No. 89-2350 (July 20, 1990), WL 100325, 12. Moreover, an Article III judge "helps impress on the jurors the gravity of their mission" in ways that a magistrate cannot. *Id.* Because an Article III Judge did not preside over jury selection, a critical

[20] The government mistakenly contends that in respondent's opposition to the petition for certiorari, she "eschewed all reliance on plain error doctrine," Pet. Br. 14, and that she "abandoned" that issue. Pet. Cert. Reply 4. It is true that in her opposition respondent did argue, albeit unsuccessfully, that certiorari was not justified to decide the "plain error" issue because *France* did not discuss it. She never asserted, however, that were certiorari to be granted, she would not rely on the "plain error" doctrine to affirm the judgment. Having now granted certiorari, this Court may affirm the decision below on any basis discussed in the record. *Boag*, 454 U.S. at 367 (Rehnquist, J., dissenting); *United States* v. *New York Telephone*, 434 U.S. 159, 166 n.8 (1977).

stage of respondent's trial, jury selection was simply "not legitimate." *Lopez-Pena*, 890 F.2d at 500, Lexis 17515 at 30 (Aldridge, Senior Judge, dissenting). Hence, the error was "plain." *Cf. United States* v. *Miller*, 468 F.2d 1041, 1044-45 (4th Cir. 1972) ("plain error" for magistrate to conduct a misdemeanor trial without the defendant's written consent, in violation of 18 U.S.C. § 3401(b) because error impaired right to trial by jury), *cert. denied*, 410 U.S. 935 (1973).

Most importantly, as previously noted, the government concedes that it would be "plain error" for a court to delegate to "a panel of citizens" the conduct of a trial even if a defendant consented. Pet. Br. 20. Presumably, even were this "panel of citizens" to conduct an exemplary trial, without a trace of error, "plain error" would still occur because, as the government acknowledges, such a "trial" would compromise the "integrity of public reputation of the judicial process" and would be a "flagrant departure" from traditional procedures. Pet. Br. 20. Consequently, if it is "plain error" for a "panel" to preside over a felony trial, it must also be plain error for the "panel" to preside over jury selection, a critical part of that trial. And if delegation to the "panel" is a "flagrant violation" of procedural norms, so must the delegation to a magistrate, for both delegations are equally unauthorized.

Moreover, contrary to the government's argument, respondent need not demonstrate that the error had a "demonstrable effect on the verdict." Pet. Br. 16. Just as no effect on the verdict need be shown when jury selection is presided over by the "panel," none need be shown here. Notwithstanding lack of objection, prejudice should be presumed from the basic structural error of "hav[ing] [a] critical stage[] of a criminal trial conducted by a person without jurisdiction to preside." *Gomez*, 109 S. Ct. at 2248. Such a presumption is particularly appropriate when jury selection is at issue, for "who decides the truth from the evidence may be as important as the evidence" itself. *United States* v. *Ford*, 824 F.2d 1430, 1438 (5th Cir. 1987) (en banc), *cert. denied*, 484 U.S. 1034 (1988). Hence an illegitimate jury selection process inevitably skews the truthfinding func-

tion of the trial.[21] *See Gomez*, 109 S. Ct. at 2247 ("the atmosphere of the *voir dire* . . . may persist throughout the trial").

Furthermore, as previously stated in *Gomez*, the Court unanimously equated the error in having a magistrate preside over jury selection to that in having a biased judge. *Id.* at 2248. Regardless of lack of objection, trial before a biased judge is "plain error." *See Rocha*, 850 F.2d at 1100 (judge's prejudicial comments constituted "plain error"). Just as no "demonstrable effect on the verdict" need be shown where the judge is prejudiced, no effect need be shown when an equally serious error occurs: having a person without jurisdiction preside at jury selection.[22]

In the instant case, as previously noted, "the effect of the violation cannot be ascertained." *See Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) (discrimination in selection of grand jury).

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[21] To be sure, in the ordinary case involving only an evidentiary error, as in *United States* v. *Young*, or an erroneous jury instruction, as in *United States* v. *Frady*, 456 U.S. 152 (1982), the defendant must show a prejudicial impact on the jury. Neither of these cases is applicable, however, because as argued above, the error here is jurisdictional or structural. In neither event is a showing of actual prejudice required. Alternatively, prejudice is presumed because the effect on the jury is "impossible" to ascertain. *Olympia Hotels Corp.*, WL 100325 at 14; *cf. Young* v. *Vuitton et Fils S.A.*, 481 U.S. 787, 809-811 (1987) (plurality opinion) (appointment of financially interested prosecutor creates appearance of impropriety with effects that are "difficult to assess"); *Strickland* v. *Washington*, 466 U.S. 668, 693 (1984) (where defense counsel burdened by actual conflict "prejudice is presumed" because it is "difficult to measure").

[22] It is true that none of the few circuits that have addressed the issue have found "plain error." *See* cases cited in Pet. Br. 14 n.8. The reasoning of each of these cases is unpersuasive, however, because none had the benefit of the government's concession here. Moreover, none considered the true magnitude of the jurisdictional and structural error, and the extent to which the integrity of the trial was impaired. Finally, none addressed this Court's having equated the error to that in having a biased judge or jury.

For example, the Court can never know the extent to which the seriousness of jury selection and the "gravity of [the jury's] mission," *Olympia Hotels Corp.*, WL 100325 at 12, was devalued in the jury's eyes by having a non-Article III Judge preside. As a result, the Court cannot know the extent to which the prospective jurors may not have taken seriously their responsibility to answer voir dire questions candidly and fully. These important questions included whether the jurors could be fair to both sides, J.A. 30-34, 37, and whether they could hold the government to its burden of proof. J.A. 29. Nor can the Court know the effect of the magistrate's refusal to ask Cassiday's question concerning Vietnam War veterans, a question that an Article III Judge would surely have posed. Because the facts in the case at bar were close and lent themselves to "starkly disparate conclusions," *France*, Pet. App. 2a, and because the effect on the jury of having a non-Article III judge preside is "impossible" to determine, *Olympia Hotels Corp.*, WL 100325 at 14, the error was "plain" and the decision below should be affirmed.

IV. COUNSEL'S FAILURE TO OBJECT DID NOT CONSTITUTE RESPONDENT'S KNOWING AND EXPRESS CONSENT TO WAIVE HER BASIC RIGHT TO HAVE HER JURY SELECTED BY AN ARTICLE III JUDGE.

Assuming, *arguendo*, that respondent could consent to an unauthorized person presiding over her jury selection, this consent would be valid only if respondent were first informed of her right to have an Article III judge conduct the jury selection and then only if she personally communicated her consent to the court. Because neither condition obtained in the instant case, there was no valid waiver.

A. The Reasoning of *Gomez* And The Intent Of Congress Require Respondent's Knowing And Express Consent As A Prerequisite To A Valid Waiver.

This conclusion follows from the repeated emphasis the Court in *Gomez* placed on the importance of consent. Indeed, the Court framed the very issue in *Gomez* as whether "presiding at the selection of a jury in a felony trial without the

defendant's consent" was proper. *Gomez*, 109 S. Ct. at 2239 (emphasis added). Moreover, the Court stressed that "a critical limitation on [a magistrate's] jurisdiction is consent." *Id.* at 2244. The Court relied heavily upon legislative history establishing that Congress had adopted a careful consent procedure as a prerequisite to the exercise by magistrates of trial jurisdiction "in the interests of policy as well as constitutional constraints . . . ." *Id.* at 2245 & n.24. Finally, the Court observed that Congress expressly provided in 18 U.S.C. § 3401(b) that a magistrate's misdemeanor trial jurisdiction was limited to the case where the defendant gave his personal consent in writing and then only after the magistrate had "carefully explain[ed]" his right to a trial before a district court judge. *Gomez*, 109 S. Ct. at 2244 & n.21; *see United States* v. *Marcyes*, 557 F.2d 1361, 1367 (9th Cir. 1977) (absent clear explanation of defendant's right to trial before an Article III judge, defendant's written consent invalid).[23]

The legislative history of 18 U.S.C. § 3401(b) underscores the Court's concern. During extensive floor debate on this statute in the House, Representative Poff, as noted in *Gomez*, stressed "[t]he intricate safeguards, the constitutional warnings, the statutory explanations, the written waivers and written elections required before the magistrate may exercise his trial jurisdiction in the individual case . . . ." *Gomez*, 109 S. Ct. at 2245 n.24 (quoting 114 Cong. Rec. H27342 (Sept. 18, 1968)).

Moreover, in response to the Justice Department's initial attack on the constitutionality of the statute, Senator Tydings reiterated the importance of consent as follows:

> The act emphasizes the signal importance of *knowledgeable waiver* by the accused of his right to jury trial before the district court. The magistrate is required by the terms

[23] 18 U.S.C. § 3401(b) provides that, in a misdemeanor case, "The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court. . . . The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court."

> of the act to give the defendant a careful explanation of the right to elect trial in the district court, and of his possible right to demand jury trial in that court.
>
> The U.S. magistrate is forbidden to proceed to trial unless the defendant, *having heard the magistrate's explanation*, executes a written election of trial before his magistrate and a written waiver of whatever jury trial right he has.

Federal Magistrates Act: Hearings before Subcomm. No. 4 of the House Comm. on the Judiciary, 90th Cong., 2d Sess. 73 (1968) (emphasis added). Similarly, in the report of the House Committee on the Judiciary to the full House, the Committee also elaborated on the consent requirement as follows:

> It should be noted that the Supreme Court has defined a waiver of rights under the Constitution as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). In order for a waiver of a constitutional right to occur, "a knowing and intelligent waiver" is necessary. *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972). Subsection (b), by requiring that the magistrate "carefully" explain the right to trial before a district judge and the right to jury trial before the district judge or the magistrate, incorporates this case law. It also requires that the record show that the accused intelligently and understandably rejected the offer, for "anything less is not waiver." *Carnley* v. *Cochran*, 369 U.S. 506 (1962). In this regard, waiver of the right to be tried by the district court is a critical stage of the proceedings requiring the presence and advice of counsel, unless also waived.

H.R. Rep. No. 96-287, 96th Cong, 1st Sess. 18.

Because of the clear Congressional intent to ensure knowing and voluntary consent to a magistrate trial jurisdiction, the circuit courts have adhered to the strict consent procedure, and many have said that without the rigid requirements set forth in the statute, the statute would be unconstitutional.[24] Almost

[24] *See United States* v. *Byers*, 730 F.2d 568, 570 (9th Cir.) (without written consent of defendant, having magistrate preside over trial would be unconstitutional), *cert. denied*, 469 U.S. 934 (1984); *United*

identical consent procedures are required for a magistrate to preside at civil trials. Thus 28 U.S.C. § 636 (c)(1) provides that the litigant's consent must be "express" and "on the record." *Lovelace* v. *Dall*, 820 F.2d 223, 226 (7th Cir. 1987). As noted by one court, "Congress passed both provisions together . . . [b]oth require the voluntary written consent of the parties . . . ." *Byers*, 730 F.2d at 570. Just as it did with misdemeanor trials, Congress felt so strongly about the consent issue in civil trial that it insisted that the rules of court "must include procedures to protect the voluntariness, knowingness, and willingness of the consent." H.R. Conf. Rep. No. 96-444, 96th Cong., 1st Sess. 8, *reprinted in* 1979 U.S. Code Cong. & Adm. News 1489. For that reason 28 U.S.C. § 636(c)(5) emphasizes the need for voluntary consent free from coercion.[25]

Moreover, courts that have addressed the issue hold that for the statute authorizing magistrates to preside at a civil trial to pass constitutional muster, consent to the magistrate's role must be "clear" and "unambiguous." *Lovelace* v. *Dall*, 820 F.2d at 225 (quoting *Adams* v. *Heckler*, 794 F.2d 303, 306-07 (7th Cir. 1986)). The courts have reasoned that "without such safeguards" as voluntary, written consent, Congress was concerned that the act would "violate the constitutional

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States v. *Dobey*, 751 F.2d 1140 (10th Cir.) (where defendant knowingly and expressly consented to trial before magistrate, conviction did not violate Article III), *cert. denied*, 474 U.S. 818 (1985); *United States* v. *Robinson*, 495 F.2d 30, 34 (4th Cir. 1974) (magistrate proceedings were deficient because "[t]he record contain[ed] no written consent by Robinson to be tried before the magistrate"); *United States* v. *Ferguson*, 778 F.2d 1017, 1019 (4th Cir. 1985) (because defendant consented pursuant to the statute, magistrate presiding over trial not unconstitutional), *cert. denied*, 476 U.S. 1123 (1986).

[25] The Federal Magistrates Act commands that the consent of the parties "shall be communicated to the clerk of the court" in order for a magistrate to preside at a civil trial. 28 U.S.C. § 636(c)(2). Moreover, this consent must be obtained via informative court procedure: "[T]he clerk of court shall . . . notify the parties of their right to consent to the exercise of such jurisdiction." *Id.* Procedures are even provided to "protect the voluntariness of the parties' consent." *Id.*

requirement that the judicial power of the United States must be vested in Article III courts. S. Rep. No. 74 at 4, U.S. Code Cong. & Admin. News 1979, p. 1472." *Fowler* v. *Jones*, 899 F.2d 1088, 1093 (11th Cir. 1990). Thus, "valid consent is the linchpin of the constitutionality of 28 U.S.C. § 636(c)." *Id.* at 1093 (quoting *Adams* v. *Heckler*, 794 F.2d at 307). Therefore, mere failure to object by counsel, as in the instant case, cannot suffice to constitute the necessary knowing consent of respondent because "failure to object . . . is no substitute for the express consent required." *Id.* at 1093. On the contrary, such consent must be "explicit and cannot be inferred from the conduct of the parties." *Lovelace*, 820 F.2d at 225 (quoting *Heckler*, 794 F.2d at 307); *see Alaniz*, 690 F.2d at 720 ("We will not permit our jurisdiction to depend on inferences").[26]

Just as failure of counsel to object to the magistrate's jurisdiction does not constitute the requisite consent in a civil or misdemeanor trial, it can hardly constitute such consent in the far more critical matter of jury selection at a felony trial. Indeed, the Court unanimously observed in *Gomez* that "the magistrate's criminal trial jurisdiction depends on the defendant's specific, written consent." *Gomez*, 109 S. Ct. at 2245. In sum, the reasoning of *Gomez*, the clear intent of Congress, and the overwhelming case law dictate that any consent to the magistrate's presiding at jury selection must at a minimum

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[26] *See also Geaney* v. *Carlson*, 776 F.2d 140, 142 (7th Cir. 1985) ("Because of constitutional overtones, courts are reluctant to imply consent to the magistrate's authority from a party's conduct"); *Ambrose* v. *Welch*, 729 F.2d 1084, 1085 (6th Cir. 1984) ("We decline to view the party's conduct throughout the proceedings as supplying the necessary consent"). In recently reversing a civil judgment because written consent to a magistrate was lacking, the Fifth Circuit concisely stated that "[w]ritten consent is an important means of safeguarding consent . . . [and] assuring the voluntariness of consent is of fundamental importance since parties consenting to trial before a magistrate are, in effect, waiving their right to trial before an Article III judge." *Murret* v. *City of Kenner*, 894 F.2d 693, 695 (5th Cir. 1990).

have been knowingly and expressly given by the respondent.[27] Because a failure to object cannot constitute such "clear and unambiguous" consent by respondent, the judgment should be affirmed.

B. Because A Constitutional Or Fundamental Right Is At Issue, Personal Consent Is Required.

Strict waiver requirements are also appropriate because, as respondent has argued in part II B, a fundamental constitutional right under Article III is at issue here. The right to an Article III judge "involves [such] important constitutional rights," *United States* v. *Mortensen*, 860 F.2d 948, 950 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1935 (1989), that it merits at least the same protection afforded the right to counsel and to a jury trial. *See Schor*, 478 U.S. at 848-49; *Pacemaker*, 725 F.2d at 541, 543 (right to an Article III judge is "personal" and must be freely and voluntarily waived) (Kennedy, J.). The government always has the burden of establishing valid waivers of constitutional rights, *Michigan* v. *Jackson*, 475 U.S. 625, 633 (1986), and that burden is never satisfied by a silent record or the defendant's inaction. *Id.*; *Carnley* v. *Cochran*, 369 U.S. 506, 515 (1962); *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); *Barker* v. *Wingo*, 407 U.S. 514, 526 n.25 (1972) (waiver of speedy trial right not presumed from inaction of defendant). In fact, courts "indulge in every reasonable presumption against

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[27] Apart from the Magistrates Act, Fed. R. Crim. P. 23(a) provides that any jury trial waiver must be by the defendant and must be "in writing." This rule is even stricter than the constitutional standard which requires only an "express, intelligent consent." *See Adams* v. *United States*, 317 U.S. 269, 277 (1942); *Patton* v. *United States*, 281 U.S. 276, 312 (1930). As argued above in part II B, at least in federal court a valid jury trial presupposes an Article III judge in "constant superintendence," *Crowell*, 285 U.S. at 61, including selecting the jury in the first place. Therefore, Rule 23(a) can be read to require a written waiver of the right to have an authorized judge preside at jury selection. Because no such written waiver exists in the instant case, respondent's waiver of her right was invalid.

waiver" of constitutional rights. *E.g.*, *Brewer* v. *Williams*, 430 U.S. 387, 404 (1977).

For example, with respect to waiver of a jury trial, a district judge must take "special pains" to "impress upon the defendant" personally the significance of his choice, to ensure the waiver is "knowing and voluntary." *United States* v. *Lyons*, 898 F.2d 210, 215 (1st Cir.), *petition for cert. filed* July 20, 1990. No less a procedure was required in the case at bar, and because it did not occur there was no valid waiver. Moreover, as argued by respondent in part II B, the right at issue is not only personal, it is "structural" because it relates to the integrity and structure of the criminal justice system. *See Schor*, 478 U.S. at 850-51. As with other such structural rights, assuming they can be waived at all, express and knowing consent is required.

Even assuming, *arguendo*, that the right at issue is not constitutional, *Gomez* did categorize the right to have an Article III judge preside at jury selection as one of "those basic fair trial rights that can never be treated as harmless." *Gomez*, 109 S. Ct. at 2248. The class of such "basic" rights is quite small and includes the constitutional right to counsel and the constitutional right to an impartial judge. *See Chapman* v. *California*, 386 U.S. 18, 23 n.8 (1967). Indeed, in *Gomez* the Court expressly equated the right at issue with that to an impartial judge. *Gomez*, 109 S. Ct. at 2248. With respect to such basic rights, this Court has always required a "strict standard of waiver." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 241 (1973).[28]

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[28] The right to counsel, for example, may be waived only "knowingly and intelligently," *Faretta* v. *California*, 422 U.S. 806, 835 (1975) (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464-65 (1938)), and the record must show that a defendant "knows what he is doing and his choice is made with his eyes open." *Faretta*, 422 U.S. at 835 (quoting *Adams*, 317 U.S. at 27a).

With respect to a defendant's right to an impartial judge, it is questionable whether such a "structural" right can be waived at all because "the requirement of neutrality has been jealously guarded by this Court." *Marshall* v. *Jerrico*, 446 U.S. at 242. Even assuming, *arguendo*, that it can, at least as strict a standard of waiver should obtain as with the right to counsel because the right to an unbiased judge is of equal if not greater importance. *See id.* at 242-43; *Ward*, 409 U.S. at 61-62.

To be sure, a defendant is frequently bound by his attorney's actions with respect to many trial rights. *See Taylor* v. *Illinois*, 484 U.S. 400, 418 (1988). Nevertheless, as shown above, "there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of his client." *Id.* at 417-18. These rights include the fundamental, structural rights that go to the heart of the criminal justice system and that affect the key players in the system, the defense lawyer, the jury and the judge. Just as the defendant must give his personal and knowing consent to waive a trial, to waive a jury, or to waive a lawyer, he must also give his personal and knowing consent to waive an Article III judge at jury selection, a "critical" stage of his trial.

Applying the foregoing principles, it is clear that whether the right at issue is constitutional or not, Congress and this Court's precedent treat the right as fundamental and subject to a strict waiver standard. In the instant case this standard was not met. First, the record is utterly silent with respect to any explanation to respondent of her right to have an Article III judge conduct jury selection. Hence her "consent" was not knowing.[29] Second, the record discloses no express consent by respondent, and, as shown above, failure to object by respondent's counsel does not constitute such consent.

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[29] In *Dobey*, the government conceded to the court that a waiver of a defendant's right to trial by an Article III judge is valid "provided" the defendant himself waived the right "knowingly and voluntarily." *Dobey*, 751 F.2d at 1142; *see United States* v. *Marcyes*, 557 F.2d 1361, 1367 (9th Cir. 1977) (absent clear explanation of his right to elect jury trial in district court, written consent to magistrate's jurisdiction invalid); *Miller*, 468 F.2d at 1043 (literal compliance with magistrate's duty under statute to explain defendant's rights is required to validate waiver thereof).

CONCLUSION

For all the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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